Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-165

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HARRIET BROOKS AND JEROME MCNAIR,
Petitioners,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
DAVID A. KIKEL

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for Respondent Chrysler Motors Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

STATEMENT REQUIRED BY RULE 28.1

Respondent in this action is a corporation whose name has recently been changed from Chrysler Corporation to Chrysler Motors Corporation. Chrysler Motors is a wholly owned subsidiary of a newly created, publicly owned holding company which has now been renamed Chrysler Corporation. The following corporations are subidiaries or affiliates of Chrysler Motors Corporation:

Automotive Financial Services, Inc.
Chrysler Canada, Ltd.
    Chrysler Leasing, Ltd.
Chrysler Capital Corporation
Chrysler Corporation Fund
Chrysler Credit Corporation
Chrysler Export Corporation
Chrysler Export Sales Inc.
Chrysler Financial Corporation
    Chrysler Commercial, S.A. de C.V.
    Chrysler Credit Canada Ltd.
        Chrysler Finance Limited
        Chrysler Life Insurance Company of Canada
    Chrysler Credit Corporation
    Chrysler Credit SBL Corporation
    Chrysler Credit Venezuela, S.A.
    Chrysler Financial Overseas Capital N.V.
    Chrysler Insurance Company
        Chrysler Life Insurance Company
    Chrysler Leasing Corporation
    Redisco Canada Ltd.
Chrysler First, Inc.
Chrysler Foreign Sales Corporation
Chrysler Institute of Engineering
Chrysler International S.A.
    CISA Financial Services S.A.
Chrysler International Services S.A.

Chrysler Italian Imports Inc.
Chrysler Learning Inc.
    Automotive Education Centers Inc.
Chrysler Learning Management Corporation
Chrysler Marine Corporation
Chrysler de Mexico S.A.
    Aire y Temperatura S.A.
Chrysler Overseas Capital Corporation
Chrysler Overseas Trading Co. Ltd.
Chrysler Plastic Products Corporation
Chrysler Realty Corporation
    Chrysler Realty Management Corporation
Chrysler San Juan Inc.
Chrysler Service Contract Company
Chrysler Training Corporation
Chrysler Transport, Inc.
Gulfstream Aerospace Corporation
NuCar Prep System, Inc.
Pentastar Aviation, Inc.
Productos Electros Diversificados S.A.
Van Pool Services Inc.

TABLE OF CONTENTS

	Page
STATEMENT REQUIRED BY RULE 28.1	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
RESTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	9
1. The Lower Courts In This Case Followed Sensible, Well-Settled Procedures Concerning Rules 403 and 703	9
2. Petitioners' Proposed New Procedures For Rules 403 and 703 Are Impractical, Unnecessary and Contrary To Efficient Judicial Administration	15
3. Petitioners' Contentions Are Not Appropriate For Review In This Case	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Brown v. Allen, 344 U.S. 443 (1953) 16
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 16
Dandridge v. Williams, 397 U.S. 471 (1970) 16
FTC v. Grolier, Inc., 462 U.S. 19 (1983) 12, 18
Government of Virgin Islands v. Felix, 569 F.2d 1274 (3d Cir. 1978) 10
In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983) 14
Jaffke v. Dunham, 352 U.S. 280 (1957) 16
J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55 (1940) 16
Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977) 13
Miller v. Poretsky, 595 F.2d 780 (D.C. Cir. 1978).. 9
Tennessee v. Dunlap, 426 U.S. 312 (1976) 12
United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984) 14
United States v. DeJohn, 638 F.2d 1048 (7th Cir. 1981) 12
United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976) 10, 11
United States v. Foskey, 636 F.2d 517 (D.C. Cir. 1980) 12
United States v. Lavelle, 751 F.2d 1266 (D.C. Cir.), *cert. denied*, 106 S. Ct. 62 (1985) 11, 12
United States v. Lebovitz, 669 F.2d 894 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982) 10, 12
United States v. Long, 574 F.2d 761 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978) 11, 12
United States v. Lovasco, 431 U.S. 783 (1977).... 12, 18
United States v. Robinson, 700 F.2d 205 (5th Cir. 1983), *cert. denied*, 465 U.S. 1008 (1984).... 10, 11
United States v. Sangrey, 586 F.2d 1312 (9th Cir. 1978) 13, 15
United States v. Sliker, 751 F.2d 477 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1772 (1985) 15

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:

	Page
Fed. R. Civ. P. 26(b)(4)	4, 19
Fed. R. Civ. P. 26(e)(1)(B)	4, 19
Fed. R. Evid. 104(b)	14
Fed. R. Evid. 403	*passim*
Fed. R. Evid. 703	*passim*
1 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 403[02] (1985)	10
3 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 703[03] (1985)	14
21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5053 (1977)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-165

HARRIET BROOKS AND JEROME MCNAIR,
Petitioners,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

This is a diversity action brought by Petitioners against Respondent Chrysler Motors Corporation ("Chrysler") in the United States District Court for the District of Columbia. Petitioners claimed in the courts below that they were injured in an automobile accident caused by a defect in an automobile manufactured by Chrysler.

Before a jury was impaneled to try Petitioners' claim, the District Court heard argument on various motions *in limine* filed by both sides. Petitioners moved the court to exclude from trial any evidence that they were not wearing seatbelts at the time of the accident; the court granted that motion. Chrysler moved the court to exclude certain exhibits proffered by Petitioners; the court also granted that motion.

The exhibits proffered by Petitioners were related to certain investigations conducted by Chrysler and the National Highway Traffic Safety Administration ("NHTSA") during 1978-80.[1] Petitioners contended that these documents concerned the same brake defect involved in their accident and that the documents should therefore be admitted to show that this alleged defect in fact caused their accident and that Chrysler knew about the defect.

Chrysler moved the District Court to exclude these exhibits on three grounds: that they were hearsay; that Petitioners had not met their burden of showing substantial similarity between their accident and the occurrences addressed in the prior investigation; and that, even if the prior occurrences were sufficiently similar to be minimally probative, they should be excluded pursuant to Fed. R. Evid. 403 because their probative value was substantially outweighed by the danger of unfair prejudice, undue delay and jury confusion.

During two days of hearings on the motions *in limine*, the District Court heard extensive argument and proffers of testimony concerning the construction and operation of brake calipers, brake pistons, dust boot seals, high-pressure hydraulic seals, and caliper bores. *See* Appellants' Appendix ("App.") at 637-874. The court also examined hundreds of pages of engineering documents, schematics, and reports developed during the investigations by Chrysler and NHTSA, and closely examined physical models and cut-aways of the disc brake calipers from Petitioners' automobile. App. at 791-800.

---

[1] These exhibits included hundreds of consumer complaints submitted to NHTSA by vehicle owners (Exs. 17 and 34) and two preliminary reports (Ex. 16B) prepared by a NHTSA engineer on the status of his review of these complaints. NHTSA's correspondence with Chrysler on this issue was offered as Exhibit 16A, and documents regarding Chrysler's own investigation of the matter were offered as Exhibit 26.

Furthermore, during these hearings the court considered evidence and entertained argument concerning the potential for unfair prejudice, undue delay and jury confusion which could result from the introduction of these exhibits. For example, as Chrysler stressed in its arguments, the vehicle owner complaints threatened to unfairly prejudice the jury in part because of the inflammatory, multiple hearsay statements by irate owners and unidentified mechanics. *See, e.g.*, App. at 674-78, 688. Moreover, as the Court of Appeals subsequently noted, to rebut the statements made in these complaints and reported in the NHTSA memoranda, Chrysler would have had to undertake separate mini-trials as to the validity, and substantial similarity, of each of these incidents. This in turn would have threatened to unduly delay the trial and confuse the jury. Pet. App. at A-16.

After reviewing the exhibits and hearing the parties' arguments, the District Court evidenced its agreement with Chrysler's position; the court therefore pressed Petitioners to identify specific information in the exhibits which showed sufficient similarity to the alleged defect in their automobile to warrant admission. *See, e.g.*, App. at 725, 727, 729. After giving Petitioners repeated opportunities to make this requisite showing, the District Court ultimately ruled the five exhibits inadmissible.[2]

In addition to receiving this ruling on the exhibits' admissibility, on several occasions during the hearings Petitioners specifically sought a ruling allowing their expert witness, Dr. Kirk, to rely on these exhibits in giving his testimony. In response, the District Court repeatedly indicated that this issue should be deferred until the *voir dire* examination of the expert. App. at 763-64, 806. Notwithstanding these indications from the court, and

---

[2] The District Court alternatively ruled that Exhibits 16B, 17, and 34 were inadmissible on hearsay grounds. App. at 704-06, 745, 874.

without making any evidentiary showing that the exhibits satisfied the requirement of Fed. R. Evid. 703 that they be "of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," Petitioners continued to press for an immediate ruling that their expert was entitled to rely on these exhibits. App. at 763, 801, 812-13. In this context, the District Court concluded that there was no basis at that time for permitting the expert to rely on these exhibits. App. at 813. The court later noted, however, that the matter was subject to reconsideration when Dr. Kirk was examined on *voir dire*. App. at 986.[3]

At no time during the proceedings before the District Court did Petitioners complain of, or object to, any lack of specificity in the court's evidentiary rulings; neither did they request the court to set forth more fully its Rule 403 balancing of the probative value of the proffered exhibits against the risks of unfair prejudice, undue delay and jury confusion; nor did they move the court to conduct any additional factual inquiry to determine whether Rule 703's requirements regarding expert witness testimony had been met.

---

[3] In a separate motion *in limine*, Chrysler sought to restrict the scope of Dr. Kirk's testimony at trial on the ground that Petitioners had failed to comply either with Fed. R. Civ. P. 26(b)(4) and 26(e)(1)(B) or with the court's pretrial order regarding the identification of expected expert testimony. During argument on this motion, Petitioners conceded that they had not complied with the requirements for identifying the substance of the expected expert testimony. App. at 838. Accordingly, the District Court ruled that Dr. Kirk's trial testimony would be limited to the opinions and conclusions set forth in his pretrial deposition and report. App. at 849. Significantly, neither Dr. Kirk's deposition testimony nor his report included any opinions and conclusions which were identified as being based on the exhibits at issue. App. at 803-06, 845-49. Thus, this ruling in itself—which was not appealed to the Court of Appeals or raised in the petition to this Court—effectively precluded any testimony by Dr. Kirk that relied on these exhibits.

Following the District Court's disposition of the motions *in limine*, Petitioners chose to call only two witnesses[4] and then rested their case without calling Dr. Kirk to the stand for a *voir dire* examination and without presenting *any* expert testimony to support their claims. Chrysler thereupon moved for a directed verdict. Petitioners offered no argument in opposition to the motion, and the District Court directed a verdict in Chrysler's favor. App. at 983, 991.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, Petitioners sought reversal of the directed verdict against them.[5] The basis of their appeal was that the excluded exhibits had been shown to be substantially similar, were not hearsay, should therefore not have been excluded, and, but for the improper exclusion, a directed verdict would have been avoided. In their briefs to the Court of Appeals, Petitioners did not separately challenge the determination that their expert could not rely on the excluded exhibits, but simply noted that the exclusion of the exhibits "emasculated" their expert's testimony.[6] More importantly, nowhere in their briefs did Petitioners raise the claims they now raise before this Court, *i.e.*, (1) that the District Court committed reversible error by failing to set forth in detail the factors it weighed under Rule 403 in excluding the exhibits and (2) that the District Court also committed reversible error in failing *sua sponte* to develop facts showing whether Petitioners' expert met the re-

---

[4] These two witnesses addressed only the chain of custody of Petitioners' automobile following the accident.

[5] In its cross appeal, Chrysler sought reversal of the ruling excluding evidence of the Petitioners' failure to utilize their seatbelts at the time of the accident.

[6] Appellants' Court of Appeals Brief at 27. Petitioners likewise did not challenge the District Court's separate restrictions on Dr. Kirk's testimony due to Petitioners' failure to comply with Fed. R. Civ. P. 26 and the court's pretrial orders.

quirements of Rule 703. Indeed, nowhere in Petitioners' Court of Appeals briefs is there any mention whatsoever of Rules 403 and 703.

Even though Petitioners now fault the Court of Appeals for examining the record to determine whether the exhibits could properly be excluded, Petitioners urged that court to conduct just such an examination. Indeed, the bulk of Petitioners' briefs to the Court of Appeals focused on the design and operation of disc brake calipers and the purported similarity between the engineering problems addressed in the 1978-80 Chrysler/NHTSA investigations and the alleged defect in their own vehicle.[7]

In response, the Court of Appeals made a detailed examination of the record below and of the hundreds of pages of engineering drawings and other documents contained in the five exhibits in question. At oral argument, Petitioners furthermore presented the Court of Appeals with diagrams and schematics illustrating the various components and subcomponents of disc brake calipers and the manufacture and operation of these components. On the basis of its own exhaustive review of the proffered exhibits, the Court of Appeals concluded that "nothing in them" expressly supported Petitioners' claim that the mechanism of corrosion allegedly occurring in their automobile was substantially similar to the problems uncovered by the Chrysler and NHTSA investigations. Pet. App. at A-9. Rather, the court found, the evidence in the exhibits:

> [D]oes not even suggest that the defect alleged by the [Petitioners] exists or that any of the few reported accidents were caused by that defect, and it only shows the possible existence of another similar, but not identical, defect in approximately two percent of Chrysler's automobiles manufactured during 1976-1980.

---

[7] *See e.g.*, Appellants' Court of Appeals Brief at 2-26, 31, 34, 37-38, 40; Appellants' Reply Brief at 1-5, 7-10.

Pet. App. at A-14 - A-15. The court therefore determined that the District Court was "amply justified in concluding that these exhibits were minimally probative on the key issues of [Petitioners'] case." Pet. App. at A-13.

The Court of Appeals further determined that introduction of these exhibits presented a substantial risk of unfair prejudice, undue delay and jury confusion. For example, the court found that the consumer questionnaires underlying the 1978-1980 investigators were:

> [R]iddled with complaints about problems with the other automobiles, unrelated to brake piston seizure, by customers dissatisfied with Chrysler's refusal to extend the warranty to cover the repairs of the dust-boot; highly inflammatory remarks about Chrysler, including comments about poor workmanship in general and about Chrysler's failure to cover the problem under the warranty; and third-party hearsay comments by the owners' mechanics and friends regarding the prevalence of brake piston seizure in Chrysler cars.

Pet. App. at A-15 - A-16. Furthermore, said the Court of Appeals, "it cannot be doubted" that the trial would have been delayed by Chrysler's attempt to rebut or distinguish each of the 330 questionnaires and by an "extensive foray" into the "nature and extent" of the 1978-1980 investigations. Pet. App. at A-16. As a result, "the jurors' attention would have been diverted from the specific claim of the [Petitioners] to the subject under study" in the prior investigation. *Id.* The court therefore held that:

> [T]he district judge properly concluded that the minimum probative value of these exhibits was substantially outweighed by the risk of unfair prejudice, trial delay, and jury confusion and that he therefore did not abuse his discretion in excluding these exhibits under Rule 403. In reaching this conclusion, we also note that the [Petitioners] made no effort

> to delete from these exhibits obviously prejudicial, irrelevant hearsay material. . . . [T]he [Petitioners] simply cannot demand that the judge admit wholesale, unedited prejudicial exhibits that will cause substantial delay in the trial particularly when they make little effort to first convince the court of the probative value of these exhibits.

Pet. App. at A-16 - A-17 (citation omitted).[8]

Finally, with regard to Petitioners' suggestion that their expert had been improperly prevented from relying on the excluded exhibits, the Court of Appeals concluded that in fact the District Court had "made clear that the scope of Dr. Kirk's testimony was still open to reconsideration when Dr. Kirk was examined on *voir dire*." Pet. App. at A-17. The Court of Appeals furthermore found "inexplicabl[e]" Petitioners' decision to rest their case without accepting the District Court's offer to hear their expert on *voir dire*. Pet. App. at A-12 n.11. Indeed, based on pretrial material showing that Petitioners' expert had based his opinion on evidence *other than* the excluded exhibits, the court stated that it simply "fail[ed] to understand" why that witness was not called to testify. Pet. App. at A-5 n.3.

In their Petition to this Court, Petitioners do not challenge the conclusion—reached by both the District Court and the Court of Appeals—that the exhibits in question were properly excluded. Instead, for the first time in this lawsuit, Petitioners ask this Court to consider whether reversal is mandatory whenever a district court (1) fails *sua sponte* to specify in detail all factors weighed in excluding evidence under Rule 403 or (2)

---

[8] Because of its decision that the District Court properly excluded the exhibits under Rule 403, the Court of Appeals did not reach the questions whether Petitioners had failed to make the requisite showing of substantial similarity or whether any of the exhibits failed to qualify for admission under the applicable hearsay exceptions. Pet. App. at A-9 n.5.

fails *sua sponte* to develop facts showing whether an expert's testimony qualifies for admission under Rule 703. Petitioners contend that Rules 403 and 703 should be interpreted to require such procedures by district courts and that appellate courts must automatically reverse district courts that fail to follow those procedures—even where the facts of record make clear that evidence has been properly excluded under those rules.

As discussed below, Petitioners' contentions are not worthy of consideration by this Court for three reasons: first, the procedures governing Rules 403 and 703 are sensible and well settled, and they were followed by the District Court and Court of Appeals in this case; second, Petitioners' proposed new procedures for those rules are impractical, unnecessary and contrary to established principles of judicial administration; and, third, Petitioners' contentions are in any event not appropriate for review in this case, owing to Petitioners' failure to raise them below and the unlikelihood that review of the contentions by this Court would in any way affect the outcome of this case.

REASONS FOR DENYING THE WRIT

1. The Lower Courts In This Case Followed Sensible, Well-Settled Procedures Concerning Rules 403 and 703.

Contrary to Petitioners' contentions, the lower courts have developed clear, sensible procedures in applying Rules 403 and 703, which were followed in this case, and there is no need for this Court to exercise its supervisory power over the Federal Rules to make radical changes to well-settled procedures.

With respect to Rule 403, district courts have been instructed by the courts of appeals to carefully weigh and balance the probative value of evidence against the dangers of unfair prejudice, undue delay or jury confusion. *See, e.g., Miller v. Poretsky*, 595 F.2d 780, 794 n.41

(D.C. Cir. 1978); *Government of Virgin Islands v. Felix*, 569 F.2d 1274, 1280 (3d Cir. 1978). District courts have also been instructed that the better practice is to place on the record the factors considered in this balancing process. *See, e.g., United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1008 (1984); *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976). The rationale for placing Rule 403 findings on the record is twofold: (1) to make clear to the appellate courts that the evidentiary rulings in question were in fact based on an exercise of the discretion given district courts by Rule 403; and (2) to give parties before a district court notice of the nature of the court's objections to the proffered evidence so as to provide those parties with an opportunity to address those objections. *See United States v. Lebovitz*, 669 F.2d 894, 901 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982); 1 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 403[02], at 403-28 (1985). Both of these goals were satisfied in the present case.

Based on the numerous specific invocations of Rule 403 during the proceedings below, the parties (and, on appeal, the D.C. Circuit) had no doubt that the District Court relied in part on its discretion under that rule to exclude the exhibits in question.[9] Petitioners were likewise given ample notice during the hearing as to the District Court's concerns about the risks of unfair prejudice and undue delay, and Petitioners were given ample opportunity during two days of hearings to address the court's objections.

---

[9] As the Court of Appeals specifically found, the District Court noted that it "concurred in Chrysler's position," even though it did not state its "specific reasons" for that concurrence. Pet. App. at A-4 n.2. In both its motion *in limine* and its oral arguments, Chrysler repeatedly invoked Rule 403 and stressed the need to balance the probative value of the evidence against the risk of unfair prejudice, undue delay and jury confusion. *See, e.g.*, App. at 180, 193, 722, 740, 782, 796-97.

Moreover, contrary to Petitioners' contentions,[10] in cases where the record had not made clear that the goals of Rule 403 have in fact been served, appellate courts have remanded for further proceedings by the district courts. *See, e.g., Robinson*, 700 F.2d at 214; *Dwyer*, 539 F.2d at 928. Two specific situations have been identified, however, where appellate courts have found it inappropriate or unnecessary to remand a case to the district courts.

First, appellate courts have been reluctant to automatically reverse and remand where the losing party did not request the district court to provide more explicit findings on the record. *See, e.g., United States v. Lavelle*, 751 F.2d 1266, 1279 (D.C. Cir.), *cert. denied*, 106 S.Ct. 62 (1985); *Robinson*, 700 F.2d at 213; *United States v. Long*, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978). In such circumstances, the party's failure to preserve its objection effectively denies the district court the opportunity to easily and efficiently correct any alleged deficiency, and the party is therefore made to bear the consequences of its implicit waiver. Second, appellate courts have also been reluctant to reverse and remand where the "factors upon which the probative value/prejudice evaluations were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *Lavelle*, 751 F.2d at 1279 (quoting *Robinson*, 700 F.2d at 213). Both of these situations are present here.

---

[10] Petitioners contend that "many federal appellate courts" are not following the requirements of Rule 403 and that "[i]f certiorari is granted, [Petitioners] will analyze the cases to demonstrate that this is so." Pet. at 9. Obviously, this Court should not grant certiorari in order to determine whether there are in fact sufficient departures from the Federal Rules to warrant this Court's review. If such departures exist—and we submit they do not—it was Petitioners' burden to describe them with specificity in their Petition.

Had Petitioners believed that the findings underlying the District Court's ruling lacked sufficient specificity, they could and should have immediately brought their concerns to the trial judge's attention. Had Petitioners taken that action, the trial judge could have easily and expeditiously addressed the concerns Petitioners now for the first time express. Instead, whether because of their satisfaction at that time with the specificity of the court's findings or because of tactical considerations, Petitioners at no time during the trial below ever asked the trial court for more specific findings regarding its Rule 403 rulings. In such circumstances, under well-settled case law, they are not entitled to raise this issue for the first time before the Supreme Court. *See FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976).[11]

Moreover, as the Court of Appeals' determinations in this case make abundantly clear, here the record leaves no doubt whatever concerning either the factors considered by the District Court or the correctness of that court's decision to exclude the proffered exhibits. Again, in such circumstances, it is well settled that remand is unnecessary. *See Lavelle*, 751 F.2d at 1279; *Lebovitz*, 669 F.2d at 901. *See also United States v. DeJohn*, 638

---

[11] As to Petitioners' complaint that the District Court should have set forth its findings with the same level of specificity found in the Court of Appeals' decision, it need only be noted that district courts in the midst of trial cannot reasonably be required to produce written opinions on evidentiary disputes comparable to those produced by appellate courts, which have far more time for detached, analytical deliberations and which are also cognizant of the widespread impact their rulings will have on other courts. *See United States v. Foskey*, 636 F.2d 517, 525 (D.C. Cir. 1980) ("[t]he district court, required to make on-the-spot decisions, does not have the luxury of engaging in the type of careful balancing we have undertaken here . . ."); *Long*, 574 F.2d at 766 ("the dynamics of trial do not always permit a Rule 403 analysis in the detail the concurrence suggests as appropriate").

F.2d 1048, 1053 (7th Cir. 1981) ("where, as here, the balance so clearly favors admission of the testimony we will not presume that the evidence was admitted for the wrong reasons"); *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978) (Rule 403 is sufficiently satisfied where the issue of prejudice was specifically addressed in a motion *in limine*, the trial judge was aware of the requirements of the rule, and the judge explicitly rejected opposing counsel's arguments).

The procedures affecting Petitioners' Rule 703 contention are equally settled in the lower courts and were equally adhered to in the present case. With respect to this rule, Petitioners again make broad, unsupported claims that lower courts are failing to follow proper procedures in implementing Rule 703 and that drastic action is needed by this Court to rectify the situation. Pet. at 12-13. And again, they offer no case support for their claims.[12]

Under the established procedures governing Rule 703, a party offering expert testimony based on inadmissible evidence has the burden of demonstrating to the trial judge that the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions

---

[12] The only case cited by Petitioners to demonstrate the allegedly widespread problems in administering Rule 703 is the case of *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977). Even this case does not support Petitioners' claims of abuse. The trial judge in *Merit Motors* was not presented with any Rule 703 issue. Instead, the judge was faced with determining the proper application of Fed. R. Civ. P. 56 in order to resolve cross-motions for summary judgment. Rule 703 was raised on appeal only by analogy as purported support for appellant's claim that an expert witness could base his testimony on speculative and unsubstantiated theories. 569 F.2d at 672-73. The case provides no support whatsoever for Petitioners' contention that the D.C. Circuit "possesses perhaps a grudging view of Rule 703 and refrains from holding the trial judge to the requirements of the Rule." Pet. at 12.

or inferences upon the subject." [13] When such evidence is presented, generally by affidavit or during the *voir dire* examination of an expert witness, the trial judge has some basis for determining whether the evidence is in fact of a type reasonably relied upon by experts. *See In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 277 (3d Cir. 1983); 3 *Weinstein, supra*, ¶ 703[03], at 703-23. The recommended practice is for the trial judge to conduct such an inquiry outside the presence of the jury. *Id.* at 703-16.

Here, it is undisputed that Petitioners never offered *any evidence whatsoever* to demonstrate that experts reasonably and ordinarily rely on documents such as those proffered by Petitioners. Indeed, the best that Petitioners can now claim on this subject is that "[b]eyond question, a powerful argument *could have been presented* here supporting the fact that the documents" meet Rule 703's requirements. Pet. at 10 (emphasis supplied). But no such argument—or evidence supporting the argument—was ever presented to the District Court. Accordingly, Petitioners did not meet their burden of showing that the testimony was admissible.[14]

---

[13] This issue comes before the trial court as a preliminary question governed by Fed. R. Evid. 104(b). Rule 104(b) "plainly contemplates that the moving party bears the burden of introducing such supporting evidence." *United States v. Cummiskey*, 728 F.2d 200, 206 (3d Cir. 1984). *See also* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5053, at 262 (1977).

[14] Moreover, as the Court of Appeals found, even though the District Court determined during hearings on the motions *in limine* that Petitioners had not yet shown Dr. Kirk's testimony to be admissible, the trial judge nevertheless "made clear that the scope of Dr. Kirk's testimony was still open to reconsideration when Dr. Kirk was examined on *voir dire*." Pet. App. at A-17. While Petitioners now question whether the District Court did clearly leave the matter open (Pet. at 5, 10), they do not and cannot question that *they* raised the issue of admissibility during the hearings on the *in limine* motions, that they had not then, or at any other time, met their burden on the issue, and that the District Court certainly never stated that it would not receive evidence on the issue.

In summary, the well-settled procedures governing Rules 403 and 703 were fairly applied in this case. As next discussed, Petitioners' proposed *new* procedures for those rules do not merit this Court's consideration.

2. Petitioners' Proposed New Procedures For Rules 403 and 703 Are Impractical, Unnecessary and Contrary To Efficient Judicial Administration.

The purposes of Rule 403 are to ensure that evidence is excluded where its unfairly prejudicial effects outweigh its probative value and to give the proponent of the evidence fair notice of the reasons for the exclusion. The settled procedures described above fully meet those purposes.

Petitioners' proposal—that reversal must follow even where it is clear that the evidence was properly excluded and even where the proponent did not request more detailed findings—would flood the lower courts with appeals seeking automatic reversal whenever *any* evidentiary ruling was not accompanied by explicit, detailed findings by the trial judge.[15] The threat of such automatic reversals would also disrupt trial proceedings by effectively forcing trial judges repeatedly to halt the flow of proceedings so that such findings could be placed on the record to support each of the numerous evidentiary rulings typically made during trial. This would be a wasteful, unnecessary burden to place upon district courts[16]

---

[15] Petitioners have offered no rationale which would justify limiting this new requirement to evidentiary rulings made pursuant to Rule 403.

[16] Appellate courts do not and should not require trial judges to set forth "a mechanical recitation of Rule 403's formula on the record . . . ." *Sangrey*, 586 F.2d at 1315. *See also United States v. Sliker*, 751 F.2d 477, 487 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1772 (1985) (it is sufficient that the "issues of both the probative value and possible prejudicial effect of admitting this evidence were presented to the judge when he made the decision to admit it").

and a needless limitation upon the authority of courts of appeals.[17] It does not deserve this Court's serious consideration.

Neither is Petitioners' proposal regarding Rule 703 worthy of further review. To correct the alleged, but unidentified, misadministration of this rule, Petitioners propose that the burden be placed on district courts themselves to show whether the facts or data in question are of a type reasonably relied upon by experts. Hence, where, as in the proceeding below, the proponent of the expert testimony makes no attempt to demonstrate that the Rule 703 requirements are met, Petitioners apparently would require trial judges *sua sponte* to initiate a factual inquiry and develop evidence which affirmatively shows that the data or facts in question are *not* of a type reasonably relied upon; otherwise, Petitioners' proposal apparently would permit the expert to rely on such facts or data.[18]

---

[17] It is well settled that appellate courts are authorized to examine the trial record to determine if there are grounds to support a judgment even where, unlike here, a district court has failed to consider those grounds or, indeed, has relied on erroneous grounds for its decision. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940). Indeed, this Court on occasion either has *directed* courts of appeals to examine the trial record in depth or has itself undertaken such reviews of the record. *See, e.g., Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Brown v. Allen*, 344 U.S. 443, 458-59 (1953).

[18] Although Petitioners' argument in this regard is not completely clear, this conclusion seems implicit in their assertion that Rule 703 "requires" a factual inquiry by a district court. Pet. at 10, 11. If, instead, Petitioners do not propose shifting the burden of proof away from the proponent of the evidence, then it is difficult to understand what Petitioners do propose in this case. If the burden remains with the proponent of the evidence, then where, as here, the proponent offers *no* evidence to meet that burden, there is no

Petitioners offer no justification for such a revision to Rule 703. Under that rule—as with other evidentiary rules—it is the proponent's burden to demonstrate the admissibility of its own evidence. In most situations under Rule 703, the proffered expert himself is capable of demonstrating on *voir dire* how and why experts in his field typically rely on such evidence. Where the expert is unable to make that demonstration, the proponent is in the best position to seek affidavits or other evidence to support the reasonableness of such reliance. By contrast, it would be unreasonable and unwarranted to expect a trial judge to marshall such evidence *sua sponte* whenever, during the course of a trial, it became apparent that the proponent would not or could not offer such evidence. Such a burden would unreasonably tax the resources of the court and would threaten severe disruption to ongoing trials.[19] There is no justification for or need to adopt any such change to the well-settled procedures for administering Rule 703.

3. Petitioners' Contentions Are Not Appropriate For Review In This Case.

Finally, even if Petitioners' contentions otherwise warranted this Court's review, these contentions are not appropriately presented by this case for two important reasons. First, Petitioners failed to present their contentions to either the District Court or the Court of Appeals in this case; this failure not only prevented the prompt and proper resolution of these issues, but it also precludes this Court from receiving the benefits of the lower courts' con-

---

factual dispute requiring any inquiry by the district court. In such situations, as below, the judge should simply rule that the evidence cannot be relied upon by the expert.

[19] Moreover, as with Petitioners' suggestions for Rule 403, there is no apparent reason why the trial judge's new obligations to conduct factual inquiries demonstrating admissibility should be limited to Rule 703.

sideration of the issues. To allow Petitioners to raise these issues at this late stage would send a signal that, whether for tactical reasons or otherwise, parties may avoid bringing such evidentiary objections to a district court's attention and press them for the first time on appeal in order to gain automatic reversal of adverse judgments. This Court should not entertain these issues in such circumstances. *See Grolier, Inc.*, 462 U.S. at 23 n.6; *Lovasco*, 431 U.S. at 788 n.7.

Second, it appears that any opinion by the Court on the issues presented would be advisory only, inasmuch as these issues are highly unlikely to affect the outcome of this case. Regarding Rule 403, Petitioners do not challenge the correctness of the Court of Appeals' findings that the exhibits in question were inadmissible because the risk of unfair prejudice, undue delay and jury confusion substantially outweighed whatever probative value the exhibits might be said to have. In such circumstances, a remand to the District Court would be pointless; that court would surely do no more than repeat the factors which the Court of Appeals has already indicated warrant exclusion under Rule 403. Moreover, it is questionable whether the Court of Appeals would or should remand for such findings at all in this case; that court might well affirm the District Court's exclusion of the exhibits on hearsay grounds and/or because the subject matter of the exhibits was not shown to be sufficiently similar to the defect alleged in the present case.

Similarly, granting Petitioners' request to shift the burden of proof in Rule 703 determinations would also not alter the outcome of this case. This is so for several reasons. First, even if the District Court had an affirmative obligation to conduct its own factual inquiry under Rule 703, that court would at the least require Petitioners' expert to appear for such an inquiry; yet it is not at all apparent that Petitioners' expert is prepared to par-

ticipate further.[20] Second, and more importantly, the record leaves in doubt (as the Court of Appeals noted) whether the expert's failure to appear at trial was in fact the result of the District Court's Rule 703 determination. Pet. App. at A-5 n.3.

Finally, and perhaps most significantly, even if Rule 703 was improperly applied by the District Court, it is clear that that application was harmless. As previously stated, during the pretrial phase of the action below, Petitioners were required by Fed. R. Civ. P. 26(b)(4) and 26(e)(1)(B), as well as the pretrial order entered by the District Court, to identify the specific substance of Dr. Kirk's testimony prior to trial. As the District Court later found, however, Petitioners failed to comply with these requirements. As a result, the District Court ruled that the substance of Dr. Kirk's testimony would be limited to that set forth in his deposition and a report previously submitted by him, neither of which offered any opinions or conclusions which relied on the exhibits in question.[21] Petitioners understandably have not challenged on appeal the soundness of this decision by the District Court. Thus, even if Dr. Kirk's testimony were held *admissible* under Rule 703, the testimony would still be *inadmissible* due to Petitioners' failure to comply with the court's pretrial order and the Federal Rules of Civil Procedure.

---

[20] According to Petitioners' counsel, Dr. Kirk apparently had become reluctant to testify at trial. Pet. App. at A-5 n.3.

[21] This decision by the District Court did not unduly restrict the scope of Dr. Kirk's testimony. As the Court of Appeals noted, Dr. Kirk had formed his opinions concerning the defect in this case prior to any review of, or reliance upon, the exhibits in question, and Petitioners themselves had indicated that Dr. Kirk's testimony would be based on videotapes, photos, and depositions of other witnesses, and not simply based on the exhibits in question. Pet. App. at A-5 n.3.

CONCLUSION

At bottom, this is a straightforward diversity action in which Petitioners simply disagree with the factual assessments made by the courts below in excluding certain evidence. Having no basis for attacking either the factual assessments or the exclusion of the evidence, Petitioners now claim that new procedures are needed for administration of the applicable rules of evidence. Petitioners' proposed new procedures, allegedly needed to correct widespread misapplication of Rules 403 and 703 by unidentified lower courts, would impose impractical, unnecessary, and burdensome requirements on the lower courts. Furthermore, Petitioners' proposed procedures were not appropriately raised below and even if adopted would not affect the outcome in this case. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
DAVID A. KIKEL

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for Respondent Chrysler Motors Corporation

* Counsel of Record